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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN M. POINDEXTER, OLIVER L. NORTH, and ALBERT HAKIM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT UNITED STATES

LAWRENCE E. WALSH
Independent Counsel

HERBERT J. STERN
(Counsel of Record)

ROBERT C. LONGSTRETH
JEFFREY R. TOOBIN
OFFICE OF INDEPENDENT COUNSEL
555 Thirteenth Street, N.W.
Suite 701 West
Washington, D.C. 20004
(202) 383-8940
Attorneys for Respondent United States

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a trial court's refusal to dismiss an indictment prior to trial, based upon its "preliminary" determination that testimony provided pursuant to a grant of use immunity "played no part in [a] grand jury's unanimous decision to indict," is subject to interlocutory review under the collateral order doctrine.

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BRIEF IN OPPOSITION FOR RESPONDENT UNITED STATES

The United States of America, through Lawrence E. Walsh, Independent Counsel, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit. That decision dismissed pretrial appeals of district court orders preliminarily denying a motion to dismiss a criminal indictment. The court of appeals correctly held that the

district court's orders are not appealable, a determination that is valid regardless of this Court's disposition of *Midland Asphalt Corp. v. United States*, 840 F.2d 1040 (2d Cir.), *cert. granted*, No. 87-1905, 108 S. Ct. 2869 (1988) (Pet. App. A).[1]

STATEMENT OF THE CASE

On March 16, 1988, a federal grand jury in the District of Columbia returned an indictment charging petitioners with conspiracy to defraud the United States, theft of government property and wire fraud.[2] Petitioners Poindexter and North were also charged with false statements and obstructing Congress; petitioner North was also charged with obstructing a Presidential inquiry, obstruction of justice, destruction of official documents, conspiracy to defraud the Internal Revenue Service, receipt of an illegal gratuity and conversion of funds for personal purposes; and petitioner Hakim was charged with conspiracy to pay illegal gratuities and offering an illegal gratuity to petitioner North.[3]

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[1] The Petition for Writ of Certiorari and the Appendices to the Petition are cited herein as "Pet." and "Pet. App.," respectively. The Government received service of the petition on December 1, 1988.

[2] The indictment also charged a fourth defendant, Richard V. Secord, with a variety of crimes. Secord is not a petitioner in this case.

[3] Prior to the return of the indictment, petitioner North made several attempts to derail the grand jury's investigation into his activities, contending that the Independent Counsel lacked the authority to conduct prosecutorial proceedings. North's attempts were unsuccessful. *See North v. Walsh*, 656 F. Supp. 414 (D.D.C. 1987) (dismissing Civil Action Nos. 87-0457 and 87-0626), *aff'd*, No. 87-5058 (D.C. Cir. Oct. 1, 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 1028 (1988); *In re Sealed Case*, Misc. No. 87-0139 (D.D.C. July 10, 1987) (holding North in civil contempt for failure to comply with a grand jury subpoena), *aff'd*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 753 (1988).

Petitioners moved to dismiss the indictment on the ground that testimony they provided to the United States Congress pursuant to grants of use immunity had been used against them in violation of *Kastigar v. United States*, 406 U.S. 441 (1972). On April 13, 1988, the United States District Court for the District of Columbia (Honorable Gerhard A. Gesell, District Judge) denied this motion "without prejudice as premature, all rights of defendants therein being preserved."[4] On the same date, the district court entered a second order scheduling a "preliminary hearing directed to certain limited *Kastigar* issues which the Court indicated it believed should be considered at the outset of this case." Pet. App. 14a. Petitioners appealed from each of these orders.

For the ensuing two months, the district court conducted extensive pretrial proceedings pursuant to petitioners' *Kastigar* motion. During that period, the district court heard oral testimony in a two-day evidentiary *Kastigar* hearing, ordered submission of voluminous evidentiary materials, reviewed the entire grand jury transcript for the 13-month investigation and heard lengthy oral arguments on the *Kastigar* issues in the case.[5]

Following this careful review, the district court on June 16, 1988 issued a lengthy opinion stating that it

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[4] The district court issued *two* orders on April 13, 1988. Although petitioners appealed from the above-quoted section of this particular April 13 order, they did not include it as one of the opinions below in their petition or in the appendix thereto. The government has reproduced the omitted April 13 order in an appendix to this brief and notes that the petitioners appealed only paragraph five of this order, which includes the language quoted above in text.

[5] Also during this period, on June 8, 1988, the district court ordered, on *Kastigar*-related grounds and over the Government's vehement objection, that the trials of the petitioners and their co-defendant Secord be severed.

had reached a "preliminary decision that the case should proceed to trial" based upon a "preliminary but thorough review" that found that the "Independent Counsel has preliminarily met his 'heavy burden' under *Kastigar*." *Id.* at 44a-46a. With regard to defendants' claims that their Congressional testimony had been used against them during the grand jury proceedings, the district court, after reviewing the grand jury transcript, found that:

> —the fact that "the great bulk of the evidence was clearly known to [the prosecution] before any [petitioner] received use immunity" provides a "strong indication that the decision to indict was in no respect tainted." *Id.* at 37a.
>
> —"[n]o immunized testimony of any [petitioner] was ever presented to the grand jury at any time in whole or in part" and the grand jurors were "specifically, repeatedly and effectively instructed to avoid exposure to any immunized testimony." *Id.* at 31a-32a; *accord id.* at 45a.
>
> —Prosecutors "appearing before the grand jury were apparently careful to avoid broad, rambling questions that might inadvertently invite generalized answers that comprehended facts not personally known to the witness but learned from immunized testimony. The questioning was precise, and called for explicit, narrow responses. The practice was also generally followed of excusing a witness before a grand juror presented his or her own questions to make sure the inquiries were expressed so as to avoid inadvertent disclosure by the witness of immunized testimony." *Id.* at 39a.

In making its "preliminary" determination that the case should proceed to trial, the district court stated that petitioners "have fully preserved their rights as outlined in their original filing," and that "[t]hese rights shall not be impaired by deferring further consideration of *Kastigar* issues to post-trial proceedings." Pet. App. at

46a. Notwithstanding the district court's explicit gua antee of further consideration of the *Kastigar* issu following a trial, petitioners appealed from this order well.[6]

The Government moved to dismiss all appeals. opposing these motions, petitioners did not contend th the district court's orders were appealable collater orders. Instead, they contended only that "the distri court's orders, in light of [*United States v.*] *Mechan* [, 475 U.S. 66 (1986)], *may* satisfy the collateral ord criteria." Appellant's Opp. to Appellee's Motion to Di miss Appeal, No. 88-3057 (D.C. Cir., filed April 25, 198 at 11-12 (emphasis added).[7]

The United States Court of Appeals for the District Columbia Circuit dismissed all of petitioners' appeals a denied their petition for a writ of mandamus. *Unit States v. Poindexter*, 859 F.2d 216 (D.C. Cir. 198 Pet. App. at 2a. The court of appeals began by rec nizing that this Court "has long held that the policy finality embodied in [28 U.S.C. § 1291] is 'inimical piecemeal appellate review' and that this policy is 'at strongest' in the field of criminal law." *Id.* at 3a (qu

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[6] On July 13, 1988, the district court denied petitioner Nort motion for reconsideration of the June 16, 1988 order. Petitio North appealed from this order. In addition, on July 20, 19 petitioners sought a writ of mandamus directing the district co to dismiss the indictment as a matter of law or to conduct ad tional pretrial hearings on the immunity issue.

[7] *See also* Appellant's Opp. to Appellee's Motion to Dism Appeal, No. 88-3057 (D.C. Cir., filed June 25, 1988) at 4 ("*Mecha may* well require the district court to resolve grand jury issues their entirety pretrial") (emphasis added); *id.* at 13 (appella under the reasoning of *Mechanik*, "*may* be foreover precluded fr raising this substantial and fundamental argument [for dismis of the indictment]") (emphasis added); *id.* at 16 ("the distr court's order, under *Mechanik*, *may* be 'effectively unreviewa after a final judgment' and, if so, should be immediately appeala as a collateral order") (emphasis added; citation omitted).

ing *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)). The court of appeals found that criminal cases in which interlocutory appeals have been permitted have satisfied each of the three requirements of the "collateral order" exception of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and, in addition, they have "involved 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial,'" Pet. App. at 4a (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)). The court of appeals then rejected petitioners' contention that interlocutory review of their use immunity claims would be justified if *Mechanik* would foreclose post-judgment review of the claims. The court of appeals reasoned that, "[i]f the claimed error will not be important enough to warrant correction on appeal from final judgment, it most assuredly is not important enough to warrant the extraordinary step of an interlocutory appeal."[8] Pet. App. at 11a (citations omitted).

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to hold their petition for *certiorari* pending its resolution of *Midland Asphalt Corp. v. United States*, No. 87-1905. In *Midland Asphalt*, the United States Court of Appeals for the Second Circuit held that *Cohen* does not allow an interlocutory appeal from denial of a motion to dismiss an indictment based on Rule 6(e) of the Federal Rules of Criminal Procedure.[9] *See* 840 F.2d at 1040. Even if *Midland*

[8] The court of appeals also found that petitioners' contention that the grant of use immunity "affords them a right not to be prosecuted at all is ill-founded." Pet. App. at 5a. Petitioners do not raise this claim here.

[9] Petitioners essentially concede that if this Court in *Midland Asphalt* follows the rulings of the Courts of Appeals for the First, Second, Third, Seventh, Tenth and District of Columbia Circuits, *see United States v. Johns*, 858 F.2d 154 (3d Cir. 1988); *United States v. Daniels*, 848 F.2d 758 (7th Cir. 1988); *Midland Asphalt*,

Asphalt is decided adversely to the United States, however, this result will not in any way impeach the court of appeals' decision dismissing petitioners' claims. There is, therefore, no reason for this Court to hold this petition pending a decision in *Midland Asphalt*.

In *Midland Asphalt*, it is uncontested that the district court's order satisfied the first of the three prongs of the collateral order doctrine, since it "conclusively determine[d]" the grand jury abuse claims involved.[10] Here, by contrast, the district court expressly and repeatedly stated that its determination is "preliminary," not final. Thus, even if this Court were to accept petitioners' argument in *Midland Asphalt* in full, an insuperable bar to the operation of the collateral order doctrine would still be present in this case.

This Court has repeatedly emphasized its insistence on adherence to the first *Cohen* requirement. For example, in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court considered the appealability of a pretrial decision denying class certification. There the district court had not expressly intended any further consideration of the certification issue, but this Court held that the district court's decision was not final under *Cohen* because it could theoretically have revisited the issue—even

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840 F.2d at 1040; *United States v. LaRouche Campaign*, 829 F.2d 250 (1st Cir. 1987); *United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986), and affirms the judgment below in that case, then the court of appeals' dismssal in this case will have been correct. *See* Pet. at 7-8.

[10] The *Cohen* test holds that for a collteral order to be appealable,

> [f]irst, it "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; [and] third, it must "be effectively unreviewable on appeal from a final judgment."

Flanagan v. United States, 465 U.S. 259, 265 (1984) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)) (footnote omitted); *accord Gulfstream Aerospace Corp. v. Mayacamas Corp.*, —— U.S. ——, 18 S. Ct. 1133, 1136-37 (1988).

though the district court's order was "tantamount to a 'death knell' for the entire case." *Coopers & Lybrand*, 437 U.S. at 470. In this case, where the district judge expressly and repeatedly stated that further proceedings on the *Kastigar* issue will be held, it is clear that the *Cohen* test cannot be met. As this Court held only last term, an order satisfies the first prong of the *Cohen* test only if it "necessarily contemplate[s] that *the decision will close the matter for all time.*" *Gulfstream Aerospace Corp.*, —— U.S. ——, 108 S. Ct. at 1137 (emphasis added; citation omitted).

Petitioners' contention that the orders are "final" because they have "finally determined" that petitioners' motion will not be granted before trial, and that petitioners will not receive the precise type of hearing before trial that they seek, is specious. *Any* preliminary decision can be characterized as a "final" decision not to resolve the issue conclusively for the moment, but to hold that an avowedly "preliminary" decision thereby becomes "final" for purposes of appeal is nothing but a sleight of hand.[11]

If, as this Court has ruled, the "rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law,'" *MacDonald*, 435 U.S. at 853-54 (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)), this Court should promptly deny this petition.

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[11] Even the single Circuit that petitioners rely upon as supporting their position has recognized that a claim based on a criminal defendant's immunity—the precise issue raised in this case—is *not* subject to interlocutory appeal. As the court below in this case recognized, the court in *United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987), "held that defendants' immunity claim could not be the subject of a pre-judgment appeal." Pet. App. at 7a n.4.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE E. WALSH
Independent Counsel

HERBERT J. STERN
(Counsel of Record)
ROBERT C. LONGSTRETH
JEFFREY R. TOOBIN
OFFICE OF INDEPENDENT COUNSEL
555 Thirteenth Street, N.W.
Suite 701 West
Washington, D.C. 20004
(202) 383-8940
Attorneys for Respondent
United States

December 1988

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 88-0080

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER, OLIVER L. NORTH, RICHARD V. SECORD, ALBERT HAKIM

PRETRIAL ORDER

Re: Certain Pretrial Motions Discussed 4/12/88.

After review of various scheduling and motions matters discussed in a pretrial hearing held April 12, 1988, the Court makes the following determinations:

1) It appearing at pretrial conference that the United States perceives the Classified Information Procedures Act as requiring the imposition of various substantial restrictions on defendants' preparation and trial of this case which may deprive them of a fair and expeditious proceeding, the Court directs that defendants shall file and serve their proposed joint motion addressing the unconstitutionality of the Act, as applied, along with any supporting factual information by 4:30 p.m. on April 29, 1988. The Independent Counsel is to reply by May 16, 1988.

2) The Independent Counsel shall respond to defendant Secord's motion to dismiss on or before May 16, 1988.

3) All motions relating to severance of offenses or defendants or concerning venue matters shall be filed by defendants on or before May 16, 1988. The Independent Counsel is to reply by May 31, 1988.

4) Scheduling of other preliminary motions now contemplated by the parties will be discussed at some point during the scheduled preliminary *Kastigar* hearing on April 25, 1988.

5) For reasons stated in detail in open court, defendants' Motion to Dismiss the Indictment for Violations of the Fifth Amendment and 18 U.S.C. § 6001 *et seq.* is denied without prejudice as premature, all rights of defendants therein being preserved.

6) In the Court's view, it is essential that at least one senior trial counsel representing each defendant should immediately receive appropriate security clearance sufficient to provide access to all necessary trial preparation materials; and to this end the Court directs that at least one senior trial attorney representing Mr. Secord shall receive appropriate interim security clearance, pending approval of already submitted formal applications, by April 15, 1988.

SO ORDERED.

/s/ Gerhard A. Gesell
GERHARD A. GESELL
United States District Judge

April 13, 1988.